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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-605

No. COA20-798

Filed 2 November 2021

Wake County, No. 18 CRS 213534

STATE OF NORTH CAROLINA

v.

AUSTIN SCOT CODY

Appeal by defendant from judgment entered 26 February 2020 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 6 October 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General James Bernier, Jr., for the State.

Cooley Law Office, by Craig M. Cooley, for defendant-appellant.

ARROWOOD, Judge.

¶ 1

Austin Scot Cody (“defendant”) appeals from judgment entered following his conviction for second-degree forcible sexual offense and sexual battery. Defendant contends he received ineffective assistance of counsel. We dismiss defendant’s claim without prejudice.

I. Background

¶ 2

The evidence offered at trial was as follows. On Friday, 28 October 2016, E.M.¹ flew from Wisconsin to visit her older sister in Apex for “[a]bout a week.” E.M.’s sister was married to defendant, with whom she had two young children. At that time, unbeknownst to E.M., her sister and defendant were experiencing marital issues and had been sleeping in separate rooms of their apartment. The night she arrived, E.M. fell asleep on an air mattress in her sister’s living room around “8:00 or 9:00 in the evening” while everyone else was still awake. Then, according to E.M., the following occurred:

¶ 3

E.M. woke up in the middle of the night to defendant touching her breast. Defendant then proceeded to put his hand in her pants, and then choked her with one hand while touching her vagina and repeatedly inserting his finger in and out of her mouth with the other hand. Defendant eventually stopped, got up to tend to one of his children,² returned a few minutes later, and “started doing the same thing again[:] . . . choking [E.M.] and putting his fingers in [her] mouth.” Defendant also touched E.M.’s breast, and took her hand and put it on his penis. Defendant eventually stopped and left to go into the master bedroom. Then, the sun rose, the children and E.M.’s sister woke up, and everyone “started making breakfast.”

¹ Consistent with the Record on appeal, a pseudonym and initials are used throughout this opinion to protect the identity of the complainant.

² According to E.M., defendant had gone to “the kids’ room because they were yelling or crying or making noise.”

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¶ 4 At the time, E.M. was conflicted as to whether she wanted to report the event to the police while still in North Carolina, and ultimately did not. On 25 January 2018, while back in Wisconsin, E.M. called the Apex Police Department and made a statement to Detective Amy Miller (“Detective Miller”). Then, on 27 March 2018, E.M. met with Detective Miller in-person for an interview.

¶ 5 On 23 July 2018, a warrant for defendant’s arrest was issued in Wake County; on 10 January 2019, defendant was arrested. On 29 January 2019, a Wake County Grand Jury indicted defendant for second degree forcible sexual offense and two counts of sexual battery. The matter came on for trial before the Wake County Superior Court, Judge Holt presiding, during its 24 February 2020 criminal session.

¶ 6 At trial, the jury heard from E.M. and Detective Miller for the State; the jury also heard from defendant, who maintained his innocence and claimed the alleged incident was consensual throughout his testimony, plus three witnesses called to testify as to defendant’s reputation. During her testimony, E.M. recalled the alleged events in significant detail and had to pause a few times in between statements; the trial court eventually took a break during her testimony.³

³ It appears, from the State’s closing argument, that E.M. may have been crying at this time: “Either she deserves an Academy Award for testifying and for crying and for showing the raw emotion that she did, or this actually really happened.”

¶ 7 At the conclusion of the trial, the jury returned a guilty verdict on one count of Second Degree Forcible Sex Offense, one count of Sexual Battery “by touching the breasts of the alleged victim[,]” and one count of Sexual Battery “by forcing alleged victim’s hand on his penis[.]” Following the entry of judgment, defendant made notice of appeal in open court.

II. Discussion

¶ 8 On appeal, defendant contends he received ineffective assistance of counsel because his trial counsel failed to object to the State’s “repeated instances of improper vouching regarding E.M.’s credibility” and “patently improper argument accusing [defendant] of falsely crafting his trial testimony after he reviewed discovery” during closing argument.

¶ 9 “Generally, claims for ineffective assistance of counsel should be considered through a motion for appropriate relief filed in the trial court and not on direct appeal.” *State v. Mills*, 205 N.C. App. 577, 586, 696 S.E.2d 742, 748 (2010) (citing *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001)). On direct appeal,

[i]n order to determine whether a defendant is in a position to adequately raise an ineffective assistance of counsel claim, . . . this Court is limited to reviewing this assignment of error only on the record before us, without the benefit of “information provided by defendant to trial counsel, as well as defendant’s thoughts, concerns, and demeanor[.]” that could be provided in a full evidentiary

hearing on a motion for appropriate relief.

Stroud, 147 N.C. App. at 554-55, 557 S.E.2d at 547 (citation omitted; last alteration in original). “[S]hould the reviewing court determine that IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant’s right to reassert them during a subsequent MAR proceeding.” *State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001) (citation omitted).

¶ 10 An ineffective assistance of counsel claim, even on direct appeal, “must establish both that the professional assistance defendant received was unreasonable and that the trial would have had a different outcome in the absence of such assistance.” *Id.* (citation omitted).

¶ 11 Defendant first argues he received ineffective assistance of counsel because his trial counsel failed to object to the State’s “improper vouching” of E.M.’s credibility during its closing argument.⁴ However, it is unclear from the Record and transcripts alone that the trial court would have granted defendant’s trial counsel’s objection. In

⁴ The portion of the State’s closing argument in question reads as follows: “And if she was truly making this up, why didn’t she -- why did she include all these other details? If this was a consensual encounter and the defendant’s statement -- if you truly and wholeheartedly believe everything the defendant said, why is she adding all this extra detail? Why not keep it at just the touch of her breast? The reality is . . . that these things actually really happened. That is what makes sense, and that is what is reasonable. . . . And, really, if this was a consensual act and she really, truly came on to the defendant, then why didn’t she just write her sister off? You know, she lives in Wisconsin. She’s engaged. She’s going to school. Why not just write your sister off if this really was consensual? No, the reasonable and commonsense explanation is the defendant actually really did sexually assault her.”

fact, defendant’s trial counsel “may have refrained from [making] objections” “as a tactical measure[.]” *See Stroud*, 147 N.C. App. at 555, 557 S.E.2d at 548. Thus, “we cannot conclusively resolve this issue from the [R]ecord.” *See id.* at 556, 557 S.E.2d at 548.

¶ 12 Defendant next argues he received ineffective assistance of counsel because his trial counsel failed to object to another portion of the State’s closing argument, in which, according to defendant, the State improperly accused defendant of leveraging the delay in E.M.’s report to “falsely craft[]” his trial testimony.⁵ However, the transcript reflects that defendant’s trial counsel actually objected to a substantially similar statement made in between the contested statements, which was omitted in defendant’s brief: “[Defendant] wants you to believe that, when I asked him, it was irrelevant for him to tell his wife first about what happened. He didn’t think that was relevant.” The trial court overruled this objection. Consequently, we cannot

⁵ This portion of the State’s closing argument, as cited in defendant’s brief, reads as follows: “And think about the amount of time that [defendant]’s had to get this story together. We know that E[M.] delayed in reporting, we’ve all heard about during jury selection and your own experiences of sexual assaults being reported that the majority of the time they go unreported. So we have this delayed report. *We have, I guess, some sort of head’s up that [E.M.] has reported this. [Defendant] has had time to get this story together. He’s had time to review discovery. He has had time to review reports. He has had time to sit in this courtroom and mirror what he wants you to believe happened and try to take away from what really actually did happen here The reality is . . . he hadn’t come up with what he was going to say or how he was going to explain away the fact that he had forced himself onto her sister. But in his mind, that wasn’t relevant.*” (Emphasis in original; first, third, and fourth alterations in original).

conclude that defendant's trial counsel did not make a tactical decision, or, had defendant's trial counsel objected slightly before or after, that the trial court would have sustained that objection or that the jury would have entered a different verdict. "In any event," we are unable to make a conclusion based on the Record and transcripts alone. *See id.*

III. Conclusion

¶ 13 Defendant has raised his claim for ineffective assistance of counsel in the wrong forum. We therefore dismiss his appeal without prejudice to defendant's right to reassert the claim through a motion for appropriate relief before the trial court.

DISMISSED.

Judges DIETZ and HAMPSON concur.

Report per Rule 30(e).